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IN THE

Supreme Court of the United States

October Term, 1963

No. 484

LAARS ENGINEERS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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vs.

NATIONAL LABOR RELATIONS BOARD,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner petitions for a Writ of Certiorari to review the judgment of the Court of Appeals for the Ninth Circuit entered in this case on June 8, 1964.

Opinions Below.

The opinion of the Court of Appeals [Appendix A, *infra*] is reported at 332 F. 2d 664. The findings of fact, conclusions of law, and order of the Board are reported at 142 N.L.R.B. No. 146.

Jurisdiction.

The judgment of the Court of Appeals was entered on June 8, 1964 [Appendix B, *infra*]. The jurisdiction of this court is invoked under 28 U. S. C. 1254(1) and Section 10(e) of the National Labor Relations Act.

Questions Presented.

1. Whether it violates the National Labor Relations Act for an Employer to grant employees a wage increase after the commencement of a union organization drive, but which wage increase was promised to the employees prior to the commencement of the organization drive.

2. Whether or not the court below erred in determining the substantiality of evidence supporting a Labor Board decision by failing to take into account contradictory evidence or evidence from which conflicting inferences could be drawn.

Statute Involved.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. 151, *et seq.*), are set forth in Appendix C, *infra*.

Statement of the Case.

The Board and the court below found that the Petitioner violated Section 8(a)(1) of the Act[1] by granting

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[1] "SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

"SEC. 8(a). It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;"

a wage increase to its employees in an effort to influence them not to support the organizational effort of the International Association of Machinists, AFL-CIO (hereinafter called the Union).[2] In its order the Board adopted the findings, conclusions, and recommendations of the Trial Examiner.

Statement of the Facts.

The Petitioner employs approximately sixty-five persons in its North Hollywood boiler manufacturing plant, whose work is under the general supervision of its president, Avy L. Miller. The employees of Petitioner had never been represented by a union and no collective bargaining agreement was existent between any union and Petitioner. For the past few years, Petitioner has dealt with a group of its employees called the "Employees' Committee" which acts as representative of the employees and consists of one employee from each of the Petitioner's three production departments.

It has been the practice of the Petitioner to review its wage structure each year and, if it was found that there had been a round of wage increases in the industry, the Petitioner would match or better such industry increases [Tr. 12]. Prior to May of 1962 the last wage increase to all production employees was granted in April of 1961 [Tr. 13]. Wage increases were made on the basis of a survey of wages made by competitors

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[2]The Board also found that a letter sent to each of the Petitioner's employees constituted a promise of economic benefit for the purpose of inducing its employees to vote against the Union in a Board election. The Court of Appeals vacated and set aside this finding and conclusion.

in about half a dozen other plants in the area; usually the survey required a month or two [Tr. 14-16]. The question of increasing the wage rates in the year 1962 was first raised in a meeting with the Employees' Committee in May of that year. At that time the employees, through the Committee, requested a wage increase. A preliminary investigation by the Petitioner, however, indicated that the cost of living factor which was the basis of the employees' request had not sufficiently altered so as to justify the granting of an increase at that time. Because Petitioner had become cognizant, however, that a general round of wage increases in the industry was "in the works", it decided to continue the investigation to see whether a wage increase was justified notwithstanding the apparent static cost of living factor [Tr. 15-16, 32-33]. Thus, commencing, in June, the testimony shows the investigation was renewed and Tom Clark, the general manager, was assigned to make a comparative wage study on behalf of Petitioner. Thereafter, on June 24, 1962, Miller met with the Committee and informed them that Clark was undertaking the comparative wage study [Tr. 16] and acknowledged at that time that he had seen in the newspapers reports of wage increases and told the employees that the company would look further into the matter. He promised the employees that a wage increase would be granted in line with the increase in the industry if the information in the newspapers was true. He further stated that the Petitioner "would match or better the industry's increases". [Tr. 32-33].

Miller further testified that some time between the meeting on July 24 and August 8, 1962, Clark left on his vacation, but before doing so he turned over to

Miller the preliminary results of the comparative wage study; Clark gave Miller some notes showing various wage figures, though the information was not complete [Tr. 16; 18]. The renewed wage study actually took less than the usual time of a month or two since the Company had actually begun the survey after the May meeting with the Employees' Committee [Tr. 16; 18].

On July 30, 1962, the Union commenced its organizational activities at the plant of the Petitioner. Its representatives, stationing themselves at each of the two entrances of the parking lot of Petitioner's plant, gave to each of the Petitioner's employees a kit as each left the parking lot on foot or by car [Tr. 20-21]; the parking lot was located across an alley from Petitioner's plant, one of the entrances was about seventy-five feet from the plant, the other entrance was near the plant. The plant entrance facing the parking lot was open at the time the distribution of the kits was made [Tr. 6-7; 21-22]. Miller, in response to the Trial Examiner's questions at the conclusion of the year, testified that he did not see the Union organizers distributing handbills and that he did not know whether or not such information came to his attention before or after August 8, 1962 [Tr. 62-63].

On August 8, Miller told the Employees' Committee that he would grant the employees an interim 5% wage increase. He informed them that though Clark was on vacation he had prior thereto presented Miller with information which clearly showed that a round of wage increases had been given in the industry and that since it had been fifteen months since the employees of Petitioner had received a wage increase the 5% interim

increase was being put into effect immediately. He further informed them that when Clark completed his survey, the increase would be adjusted upward, if necessary, to reflect the general round of wage increases, but that in no case would the interim increase be adjusted downward.[3] [Tr. 9; 33]. Miller testified that at the time the wage increase was announced and at the time it was given to the employees, nothing was said to any person connecting the wage increase with any Union organizing [Tr. 37].

Reasons for Granting the Writ.

This case brings before the Court two important questions concerning the interpretation and administration of the National Labor Relations Act.

(1) The first question concerns the interpretation to be given to Section 8(a)(1) of the Act, specifically the right of an employer to give a wage increase or other economic benefits to his employees after a Union has commenced an organizational drive to enlist the support of those employees for the purpose of collective bargaining. This Court has already ruled in *N.L.R.B. v. Exchange Parts Co.*, 375 U. S. 405 [Jan. 13, 1964] that if such wage increase or other economic benefits are given for the purpose and with the intention of inducing the employees to vote against the Union, the employer is in violation of Section 8(a)(1). The Court, however, has not been met with the situation wherein a wage increase or other economic benefit had been promised to employees prior to the Union's organizational drive but granted to them thereafter. The issue

[3]The wage survey was not completed because of the subsequent Union campaigning [Tr. 17].

in this case is whether such a wage increase, under such circumstances, was, in fact, done for the purpose of "thwarting the organizational rights of the employees", and whether there is substantial evidence to support such a conclusion. The Board, in drawing such a conclusion made three intertwined findings to support its decision:

(a) It assumed, without any affirmative evidence whatsoever, that the Petitioner knew at the time that it announced the wage increase on August 8, 1962, that the Union was organizing its employees; then

(b) It ignored, without justification, the fact that a wage increase was promised to the employees on July 24, 1962, prior to any Union activity of any kind; and then

(c) It found, based upon surmise and inference, that the wage increase was granted for the purpose of thwarting the organizational rights of the employees.

There was no evidence that the Petitioner knew of the Union's organizing efforts at the time Petitioner granted the wage increase on August 8, 1962. Mr. Miller, Petitioner's president, testified that he did not see the Union organizers distributing handbills on July 30, 1962, nor could he recall whether or not such information came to his attention before or after the wage increase [Tr. 61-63]. Indeed, the Board at the conclusion of the hearing, realizing that there was no testimony as to whether or not management had knowledge of the Union's organizing efforts at the time it put into effect the wage increase in August 1962, endeavored to elicit testimony on this point. The Board, in its report, concluded that the "pattern of vagueness and self-contradiction in Miller's testimony"

suggested that management was cognizant of the Union's organizing efforts at the time it put the wage increase into effect.

The Board's unusual findings, therefore, must be set aside for at least two salient principles of law: First, the Board has clearly erred in assuming that the burden is on the Petitioner to prove its innocence. The Petitioner does not have the obligation to explain anything until the General Counsel has put on a *prima facie* case. This the General Counsel failed to do; in fact, until the Board, at the conclusion of the hearing, asked a few questions relating to management's knowledge of Union organization at the time of the increase, there was no evidence in the record on this point.

The Board and its General Counsel maintains throughout the proceedings the burden to prove affirmatively and by substantial evidence the facts which it asserts. *N.L.R.B. v. D. Gottlieb & Co.*, 208 F. 2d 682, 684 (7th Cir., 1953); *N.L.R.B. v. Reynolds International Pen Co.*, 162 F. 2d 680, 690 (7th Cir., 1947). The Board itself has long recognized that when a question of the employer's motivation is involved, it is up to the General Counsel, not the employer, to meet the burden of proof to show that the employer was motivated for unlawful purposes. See *e.g., W. C. Nabors Co.*, 89 N.L.R.B. 538 (1950).

Rather than following the burden of proof doctrine, the Board was content in resting its position upon what was scarcely a scintilla of evidence (and even that circumstantial) that exists in the record which could possibly support the Board's position. In essence, the Board asserted that the Petitioner was aware of the Union's organizing efforts based upon the attendant

"fact" that, unlike in prior years the wage survey normally took a month or two, but that the wage increase given on August 8, 1962 came about only two weeks from the time that the Company told the Employees' Committee it would conduct a wage survey. In this regard the Board has played fast and loose with the evidence on the record. Actually, the wage survey conducted by the Petitioner began in May of 1962, was renewed again in June, and consequently the final study took less time than usual since the preliminary work had begun months before [Tr. 14-18; 32-33].[4]

It is clear, therefore, that rather than recognizing that an employer's alleged unfair labor practice must be shown by a preponderance of evidence to establish a violation of the Act, *N.L.R.B. v. Walton Mfg. Co.*, 286 F. 2d 16 (5th Cir., 1961), the Board failed to take into account contrary evidence or evidence from which a conflicting inference could be drawn. It must always be remembered that the burden of proving indiscriminate acts by the employer is, and remains, upon the General Counsel and that such a burden cannot be met by the simple expedient of discrediting Petitioner's witnesses. *N.L.R.B. v. Miami Coca-Cola Bottling Company*, 222 F. 2d 341 (5th Cir., 1955).

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[4]The Board added that at the time of the increase of August 8th, the General Manager did not explain why an interim increase was necessary. Uncontradicted evidence shows that Miller told the employees at that time that the information which Clark had given him prior to going on vacation, clearly showed that a round of wage increases had been given in the industry and that it had been fifteen months since the employees of the Petitioner had received a wage increase; consequently, he testified, he informed the employees that he felt an interim 5% increase was justified immediately [Tr. 9; 33].

In the final analysis, however, the Board clearly erred in adopting, as the second but foremost basis of its position, a rationale which is patently contrary to established law. In sum, he entirely discredited Miller's evidence because it was "attended by vagueness and entangled in self-contradiction." *But the affirmative of an issue is not proved because the Board disbelieves a denial!* The fact that the Board may have disbelieved Miller's testimony that he does not recall that he had knowledge of the Union's organizational activity, does not prove that, in fact, he had knowledge before August 8, 1962. As stated in an analogous situation, *N.L.R.B. v. Radcliffe*, 211 F. 2d 309, 316 (9th Cir., 1954) (concurring opinion):

> ". . . The fact that the Board, as it had the right to do, refused to credit the testimony of the employers that they did not know of the union activity, is no proof that they did. Belief that a witness is lying is not a substitute for evidence that the opposite of his testimony was the fact. A witness who testified that a horse was white, in a manner and with such demeanor as to convince the tribunal that he is testifying falsely, does not thereby furnish proof of an allegation that the horse was black. A district court, furnished with nothing better than that, would have to direct a verdict against its proponent. Cf. *Dyer v. MacDougall*, 2 Cir., 201 F.2d 265, 269."

It should also be noted that both by statute (Title 29, §160(b)) and by the Board's own rules (§102.39), the Board's proceedings must measure up to the "rules of evidence applicable in the district courts." The Board in this case, basing its decision almost entirely upon its

disbelief of Petitioner's testimony, has adopted a wholly novel and unsupportable rule of evidence.

The Board continued its erroneous procedure by effectively ignoring the fact that Petitioner had promised a wage increase to the Employees' Committee at the meeting on July 24, 1962, and prior to any Union activity of any kind. At that meeting, not only did Miller inform the Committee that a comparative wage study would be conducted, but he told the employees that he was aware of reported wage increases in the industry and that if such increases really had been given by others, Petitioner "would match or better the industry's increases" [Tr. 8-16; 32-33]. The Board further failed to give any consideration to the additional fact that at the time the wage increase was given, nothing was said by any person connecting it with any Union organizing. The failure to give weight to these facts cannot be condoned; to draw inference upon inference to find contrary to Petitioner's position, despite the lack of affirmative evidence, on the one hand, and the existence of contrary evidence on the other hand, cannot be tolerated. As the Seventh Circuit Court of Appeals stated in a comparable situation, *N.L.R.B. v. Audio Industries, Inc.*, 313 F. 2d 858 (7th Cir., 1963):

> "In summary, a reading of the entire record indicates that the Trial Examiner and the Board erred in ignoring testimony which was largely uncontroverted in any material respect, and in substituting their judgment for what are basically managerial decisions. Their mere failure to accept the reasonableness of the respondent's explanations regarding these five employees does not mean that respondent's action must have been motivated by

antiunion animus. See *N.L.R.B. v. McGahey*, 233 F.2d 406, 412-413, 38 LRRM 2142 (5th Cir., 1956), and *Portable Electric Tools, Inc. v. N.L.R.B.*, 309 F.2d 423, 51 LRRM 2331 (7th Cir., 1962)."

Likewise, even if, *arguendo*, circumstances surrounding the wage increase would raise suspicions that it was done for improper motives, mere suspicions or surmise is not sufficient to support a finding of an unfair labor practice, *N.L.R.B. v. Schen-Valley Meat Packers, Inc.*, 211 F. 2d 289 (4th Cir., 1954).

The Court below, it is submitted, made the same unsupported findings of fact and unfounded inferences that respondent made. The Court considered the vagueness of Miller's testimony as adequate grounds for concluding that the Board had sufficient evidence before it that Miller was aware of the Union organizational activities prior to putting the wage increase into effect. There is no evidence supporting this conclusion, however. Secondly, the Court below wrongfully adopted the conclusion of the Board that the promised wage increase was accelerated to thwart the Union's organizational efforts. In order to support this conclusion—and its only support—was that the increase was granted before the completion of the survey. The evidence points out beyond contention, however, that the survey, which had been initiated much earlier, took less time to be renewed because the preliminary work had been done months before. In addition, the uncontradicted evidence showed that the Petitioner had, by August 8, 1962, information showing that a round of wage increases had been given in the industry and that, therefore, there was sufficient reason justifying an immediate 5% interim in-

crease [Tr. 9; 14-18; 32-33]. This evidence the Court below apparently ignored. Thereafter the Court below made the same erroneous conclusion, based upon the prior unfounded premises, that the wage increase was granted to thwart the organizational rights of the employees.

It is submitted that the importance of this case becomes apparent when it is realized that numerous employers throughout the country are constantly adjusting their wage rates and granting their employees other economic benefits. To hold, on such a weak record, that economic benefits accorded employees after a Union organizational drive commences, but promised by the employer, and expected by his employees prior to the commencement of Union organizational activities, unduly prejudices both the employer and employees and creates unstable labor relations; such a policy defeats the congressional intent in enacting the National Labor Relations Act.

(2) An additional reason for granting the writ in the instant matter is that the Court below apparently failed to take into consideration in the instant case this Court's admonition and directive as set forth in *Universal Camera Corp. v. N.L.R.B.*, 340 U. S. 474 (1951). There this Court stated that

> "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight . . .
>
> "Congress has merely made it clear that a reviewing Court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view" [pp. 487-488].

When reviewing courts enforce orders of the respondent on such manifestly weak records as in the instant case, then the doctrine of *Universal Camera Corp.* is either not clearly understood or is not being followed. Certainly, in the instant case, such would seem to be true. "When the Board could as reasonably infer a proper motive as an unlawful one, substantial evidence has not proved the [employer] to be guilty of an unfair labor practice . . ." *N.L.R.B. v. Houston Chronical Publishing Co.*, 211 F. 2d 848 (5th Cir., 1954). Similarly, "Testimony which requires the pyramiding of so many inferences in order to sustain a finding" of discriminatory activity "cannot legitimately substitute for that 'substantial evidence' essential to enforcement of a Board order". *N.L.R.B. v. National Paper Co.*, 216 F. 2d 859, 862-863 (5th Cir., 1954).

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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3 September 1964.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

National Labor Relations Board, Petitioner, vs. Laars Engineers, Inc., Respondent. No. 18,994.

[June 8, 1964]

On Petition for Enforcement of an Order of the National Labor Relations Board

Before: Jertberg, Browning and Duniway, Circuit Judges.

Jertberg, Circuit Judge:

The case is before us on the petition of the National Labor Relations Board (hereinafter the Board), for enforcement of its order issued on June 20, 1963, against Laars Engineers, Inc., (hereinafter referred to as respondent). The Board's decision and order are recorded at 142 NLRB No. 146. This court has jurisdiction of the proceedings under Section 10(e) of the Act. No jurisdictional issue is presented on this appeal.

The Board found that respondent violated Section 8 (a)(1) of the Act,[1] by accelerating a wage increase to

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[1] "SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an

its employees in an effort to influence them not to support the organizational effort of the International Association of Machinists, AFL-CIO, (hereinafter called the Union), and by sending a letter to each of its employees which the Board found constituted a promise of economic benefits for the purpose of inducing its employees to vote against the Union in a Board election.

In its order the Board adopted the findings, conclusions and recommendations of the Trial Examiner.[2]

The respondent employs approximately sixty-five persons at its North Hollywood, California, boiler manufacturing plant, whose work is under the general supervision of its president, Avy L. Miller.

The employees of respondent had never been represented by a Union and no collective bargaining agreement was existent between any union and the respondent. For the past several years, it has dealt with a group of its employees called the "Employees' Committee" which acts as representative of the employees and consists of one employee from each of the respondent's three production departments. It has been the

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agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

"SEC. 8 (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;"

[2]One member of the Board found nothing in the preelection letter sent to respondent's employees violative of Section 8(a)(1) of the Act, but did find the letter is within the constitutional right of "free speech" and protected by Section 8(c) of the Act.

practice of the respondent to review the wage structure of its employees each year and to match or better wage increases occurring among respondent's competitors. The last increase in wages to all production employees was granted in April, 1961. Miller testified that the wage increases were made on the basis of a survey of wages paid by competitors, which survey usually required a month or two to conduct.

In May of 1962, the respondent's employees, through their Employees' Committee, requested a wage increase but respondent determined that the cost of living factor, which was the basis for the employeees' request, had not altered sufficiently to justify an increase at that time. On July 24, 1962, at a meeting attended by Miller, the Employees' Committee and Tom Clark, general manager of respondent's plant, members of the Committee requested an increase based upon newspaper reports of wage increases at other plants. Miller stated that there had been such reports, promised to conduct a survey, and if the reports were confirmed to make a wage adjustment by matching or bettering wage increases granted by competitors. At that meeting Miller stated that Tom Clark would conduct a survey.

On July 30, 1962, toward the end of the work shift, two representatives of the Union stationed themselves, one at each of the entrances to the parking lot of the respondent's plant, and gave to each of respondent's employees a kit as each left the parking lot on foot or by car. The kit consisted of a folder colored red, white and blue containing information about employees' rights under the National Labor Relations Act, material describing the advantages to unionization claimed by the Union, and requested each employee to execute and mail

to the Union a form enclosed in the kit which would have the effect, upon execution, of designating the Union as the signatory's bargaining representative. The parking lot was located across an alley from respondent's plant, one of the entrances was about seventy-five feet from the plant; the other entrance was near the plant. The plant entrance facing the parking lot was open at the time the distribution of the kits was made.

On August 8, 1962, Miller met with the Employees' Committee and told the members of the Committee that all production and maintenance employees would be given a five percent increase in their wages, effective immediately, and that when Mr. Clark completed his survey, the increase would be adjusted upward, if necessary, to reflect the general round of wage increases, but that in no case would the interim increase be adjusted downward.

On August 20, 1962, the Union filed a representative petition with the Board, seeking election as bargaining representative of respondent's production and maintenance employees. Thereafter, in the representative proceedings, the Union and respondent entered into a "consent election agreement," and an election was scheduled for September 20, 1962. Two days before the scheduled election date respondent sent a special delivery letter to each employee eligible to vote. The letter sets forth comparative wage and benefit tables between respondent and two of its competitors whose employees were represented by Unions, which showed that respondent pays higher wages and provides greater benefits than two unionized competitors, one of whom bargains collectively with the Union. The letter inter

alia recites that respondent was opposed to an outside Union; that it had always been respondent's policy to keep wages higher than the average in the industry; that respondent's average employee was ahead almost $600.00 a year without ever having paid anything to a Union; respondent could not pay any more wages or benefits at that time because to do so would put it at a competitive disadvantage with competitors paying less; and that respondent would never agree to wage demands that would make it noncompetitive and force it out of business, and that it would continue to operate the plant in event of a strike. The letter concludes as follows:

> "Is it worth letting yourself be talked into the possible loss of your job and the sure loss of a pleasant place to work when you are already getting much more than this same union has gotten for its members in this industry, and you are already getting all the wages and benfits we can possibly pay?
>
> Just look at the record and you will see that a 'yes' vote is a vote for a union which has obtained . . .
>
> lower wages
> fewer benefits
> more union dues
> more union assessments
> possible strikes
>
> A 'NO' vote is a vote for . . .
>
> higher wages
> more benefits
> no dues
> no assessments
> no strikes
>
> Only *you* can decide."

The election, which the Union lost 34 to 10, was set aside by the Board's Regional Director, upon objections filed by the Union, on September 26, 1962.

The Board found that respondent put the wage increases into effect when it did in order "to deflect the interest of its employees from the Union's organizational efforts," and concluded that by granting the increase that respondent "interfered with the exercise of rights guaranteed its employees by Section 7 of the Act, thereby violating 8(a)(1) of the Act."

Respondent granted a wage increase on August 8, 1962, and concedes that as a general proposition such activity, when done for the purpose of inducing employees to vote against the Union, is violative of Section 8(a)(1). It is respondent's position that the evidence is insufficient to support the conclusion that the wage increase was granted for the purpose of thwarting the organizational rights of the employees. In this connection respondent asserts:

> (1) That the record is barren of any evidence that respondent knew at the time it announced its wage increase on August 8, 1962, that the Union was organizing its employees;
>
> (2) That the Board ignored that a wage increase was promised to the employees prior to any Union activity of any kind; and
>
> (3) That the Board's conclusion the wage increase was granted for the purpose of thwarting the organizational rights of the employees is based only on inference and surmise.

In respect to respondent's first assertion, we note that although Miller testified he had not seen the dis-

tribution of the kits at the parking lot on July 30, 1962, he testified that such activity had come to his attention. In response to the Trial Examiner's questions to pin down approximately when he learned of the organizational activity, Miller testified at one point that it was about ten days to two weeks after July 30th; at another point that it was about the time of the August 8th meeting; and at another time that it may have been before or after the August 8th meeting, but his recollection failed as to just when.

In respect to respondent's second assertion, it is true that the Employees' Committee requested a wage increase prior to the organizational activities of the Union and that respondent promised to conduct a survey of reports of wage increases at other plants, and, if the reports were confirmed, to make a wage adjustment by matching or bettering wage increases of other competitors. The question before us, however is not whether respondent would have increased wages at some time or other in response to the request of the Employees' Committee, but whether the increase was granted when it was, because of the Union activities. We note from the record that the increase was granted prior to the completion of the survey, and that the increase granted was an interim one—clear departures from past practices of respondent. No reason appears why the interim increase was granted when it was, and before completion of the survey, except Miller's testimony that a wage adjustment was overdue since some sixteen months had elapsed since the last increase.

In respect to respondent's third assertion, it is to be borne in mind that the intent, purpose or motive of respondent in granting the wage increase must neces-

sarily rest upon reasonable inferences drawn from the evidence in the case and the weight to be accorded to the testimony of Miller, who was the only witness before the Trial Examiner on this phase of the case. Clearly, Miller was an interested witness who was opposed to the unionization of respondent's employees. It is seldom that motive, intent or purpose of a person in performing an act may be established by direct evidence. Also to be considered is the close coincidence of the Union activity and the wage increase.

We have reviewed the entire record and hold that the evidence supporting the finding and conclusion of the Board that the wage increase was granted for the purpose of thwarting the organizational rights of the employees is substantial when viewed in the light that the record in its entirety furnishes.

We disagree with the Board that certain statements from the respondent's preelection letter constituted interference, restraint, or coercion within the meaning of Section 8(a)(1) of the Act. We agree with the view expressed by Member Rogers of the Board that "the letter, in pointing out to the employees that present benefits as compared with the benefits obtained by the Union in plants it represented, is within the constitutional right of 'free speech' and is protected by Section 8(c) of the Act."[3] We see no threat of reprisal, or

[3] "SEC. 8. (c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * *"

force, or promise of benefit in the letter. The letter as a whole does not justify the narrow and strained construction given to it by the Board. See *Union Carbide Corporation v. National Labor Relations Board,* 310 F.2d 844 (6th Cir. 1962).

Such finding and conclusion of the Board is vacated and set aside. In view of the last stated holding, we believe that the decision and order of the Board is too broad and that paragraph (b) of the "Cease and Desist From" portion thereof should be and is hereby stricken therefrom, and that there be deleted from the notice to be posted the corresponding provision therein contained. In *National Labor Relations Board v. International Longshoremen's and Warehousemen's Union, Local 10, et al.,* 283 F.2d 558 (1960), this court stated at page 568:

> "The Board cannot restrain practices which it has neither found to have been pursued nor to be related to proven unlawful conduct. * * *"

The Board's petition for enforcement, as herein modified, is granted.

APPENDIX B.

Decree.

United States Court of Appeals for the Ninth Circuit.

National Labor Relations Board, Petitioner, v. Laars Engineers, Inc., Respondent. No. 18994.

Before: Jertberg, Browning and Duniway, Circuit Judges.

This Cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order, dated June 20, 1963, directed against Respondent, Laars Engineers, Inc., its officers, agents, successors, and assigns. The Court heard argument of respective counsel on May 12, 1964, and has considered the briefs and transcript of record filed in this cause. On June 8, 1964, the Court, being fully advised in the premises, handed down its opinion modifying the Board's order and, as thus modified, granting enforcement. In conformity therewith, it is hereby

Ordered, Adjudged and Decreed by the United States Court of Appeals for the Ninth Circuit that Respondent, Laars Engineers, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from offering, promising or guaranteeing any of its employees higher wages or benefits or any changes in terms or conditions of employment of any employee in order to influence the choice of a bargaining representative by an employee, or the attitude of any employee toward any labor organization; or increasing wages or rates of pay of any of its employees for the purpose of so influencing such choice or attitude.

2. Take the following affirmative action which, it is found, will effectuate the policies of the National Labor Relations Act:

(a) Post in conspicuous places at its usual place of business at North Hollywood, California, including all places where notices to employees are customarily posted, copies of the notice attached hereto and marked Appendix A. Copies of said notice to be furnished by the Regional Director of the Twenty-first Region of the National Labor Relations Board (Los Angeles, California), shall, after being signed by a duly authorized representative of the said Respondent, be posted by it immediately upon receipt thereof and maintained by it for 60 days thereafter in such conspicuous places. Reasonable steps shall be taken by the said Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the said Regional Director, in writing, within 10 days from the date of this Decree, what steps the said Respondent has taken to comply therewith.

Endorsed, Decree Filed and Entered
/s/ FRANK H. SCHMID,
Frank H. Schmid
Clerk

[A True Copy,

Attest:
Frank H. Schmid
Clerk]

APPENDIX C.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively, through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

SEC. 10 (e) The Board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States

Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined herein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its members, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the record. * * * Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the * * * Supreme Court of the United States upon writ of certiorari or certification as provided in Section 1254 of title 28.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 484

LAARS ENGINEERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 332 F. 2d 664 (Pet. A-1-A-9). The Board's decision and order (R. 28-29, 15-25)[1] are reported at 142 NLRB 1341.

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[1] "R." refers to the pleadings, decision and order of the Board, and other papers reproduced as "Volume I, Pleadings" in the court below; "Tr." refers to portions of the transcript of testimony reproduced pursuant to Rules 10 and 17 of the court below; and "G.C. Ex." refers to exhibits of the General Counsel.

JURISDICTION

The decision of the court of appeals was rendered on June 8, 1964, and its decree was entered on August 4, 1964 (Pet. A-1, B-1, B-2). On September 9, 1964, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including September 18, 1964, and the petition was filed on September 11, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the finding of the National Labor Relations Board that petitioner violated Section 8(a)(1) of the National Labor Relations Act by granting a wage increase at a particular time in order to induce its employees not to support the organizational efforts of the Union.

STATUTE INVOLVED

The relevant statutory provisions are set forth in Appendix C to the petition.

STATEMENT

Petitioner employs approximately 65 persons whose work is subject to overall supervision by its president, Avy L. Miller. It is petitioner's practice to review wages about once a year and to "match * * * or better" wage increases given "generally, and particularly in our industry" (R. 16; Tr. 12).

Petitioner meets occasionally with an Employees' Committee, consisting of one representative from

each of its three production departments. On July 24, 1962, President Miller and General Manager Clark met with the three employee representatives, who said they had read about wage increases at other plants and "felt that an increase was overdue." The management representatives said Clark would make a comparative wage survey among petitioner's competitors and, if an adjustment was indicated, would match or better "the industry's increases" (R. 16-17; Tr. 7-8, 11-12, 32).

On July 30, 1962, toward the end of the work shift, two representatives of the International Association of Machinists stationed themselves at the two parking lot entrances to the plant,[2] and gave the employees a kit as they left the premises. The kit included a folder and a card designating the Union as the signatory's bargaining representative. The folder included information on employees' rights under the Act, described the advantages of unionization, and requested the recipient to sign the card and mail it to the Union (R. 17; Tr. 20-21, G.C. Exh. 3A, 3B, 3C). The plant doorway was open at the time the kits were distributed and there was no obstruction to visibility between the doorway and the parking lot entrances (R. 17; Tr. 22).

On August 8, 1962, President Miller told the Employees' Committee that all production and mainte-

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[2] Petitioner's facilties include a parking lot which is separated from the manufacturing plant by a driveway. The lot has two entrances, about 60 to 75 feet apart. Both entrances are plainly visible from the plant doorway (R. 16; Tr. 6-7, 21-22).

nance employees were being given a five percent wage increase, which "would be adjusted upward, if necessary, but not downward" upon completion of the comparative wage survey by Plant Manager Clark who was then on vacation. The increase was put into effect the same day (R. 17; Tr. 9).

The Board found that petitioner had granted the wage increase on August 8 "to deflect the interest of its employees from the Union's organizational efforts," and thereby violated Section 8(a)(1) of the Act (R. 18-20, 28).[3] The Board's order (R. 22-23, 28) required petitioner to cease and desist from the unfair labor practice found and from in any like or related manner infringing upon its employees' rights under the Act, and to post an appropriate notice.

The court of appeals held that the evidence supporting the Board's finding that petitioner had granted the wage increase at the particular time for the purpose of thwarting the organizational efforts of the Union "is substantial when viewed in the light that the record in its entirety furnishes" (Pet. A-8), and enforced the Board's order in this respect.

ARGUMENT

This Court held in *National Labor Relations Board* v. *Exchange Parts Co.*, 375 U.S. 405, 409-410, that

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[3] The court below rejected the Board's further finding that, prior to a Board election, the Company had unlawfully promised its employees additional economic benefits to induce them to vote against the Union. That issue is not involved in this proceeding.

an employer violates Section 8(a)(1) of the Act if he grants economic benefits for the purpose of inducing his employees to reject a union organizing effort. Petitioner's sole contention is that the record does not support the Board's findings, sustained by the court of appeals, that it knew the Union was organizing its employees and that it accelerated a wage increase to influence them not to support the Union (Pet. 7-8, 12). An evidentiary issue of this kind, turning, as it does, only on the specific circumstances of this particular case, plainly does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

In any event, the record supports the Board's finding. As noted by the court of appeals (Pet. A-6-A-8), petitioner departed from past practice in giving an "interim" wage increase on August 8, 1962, before completion of a wage survey; the wage increase closely coincided with the Union's organizing activity; and, although President Miller denied seeing the distribution of the kits at the parking lot on July 30, 1962, he testified that this organizing activity came to his attention sometime after July 30, 1962.[4] From these circumstances, the Board was justified in concluding that the wage increase was given at the particular time for the purpose of inducing the employees to reject the Union.

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[4] The testimony of Miller is summarized in the Trial Examiner's report, which the Board adopted. 142 NLRB 1341, 1345, n. 2, R. 20, n. 2; Tr. 61-63.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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DOMINICK L. MANOLI,
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National Labor Relations Board.

OCTOBER 1964

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